Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS,
CLERK

(8) (9)

Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,
Spokane County Prosecuting Attorney
Appellant,

vs.

SPOKANE ARCADES, INC., et al.,
Appellees,

No. 84-143

KENNETH EIKENBERRY,
Attorney General for the State of Washington, et al.,
Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,
Appellees,

On Appeal From The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF APPELLANT BROCKETT

DAVID A. SARACENO
Deputy County Prosecutor
W. 1115 Broadway Avenue
Spokane, Washington 99260
(509) 456-5764
Counsel of Record
For Appellant Brockett

41 pp

QUESTIONS PRESENTED

1. May a United States Court of Appeals compel state anti-obscenity laws to define "prurient" with words that mean a shameful or morbid interest in sex, nudity or excretion, where this Court has never required state statutes to define "prurient" in a similar manner?

2. May state obscenity laws be written, under the "prurient interest" prong of the test, to regulate matter which portrays erotic sexuality in a manner designed to create some form of stimulation, or must states only regulate matter which appeals to a shameful or morbid interest in sex, nudity or excretion?

3. Does a United States Court of Appeals have the authority to construe Supreme Court cases and mandate one national definition of.

"prurient" for state obscenity laws where this Court has never mandated a national definition of "prurient" and to the contrary, has specifically allowed local community control of obscenity?

LIST OF PARTIES TO THE PROCEEDINGS

1. Kenneth Eikenberry, Attorney General for the State of Washington;

2. Donald C. Brockett, Spokane County Prosecutor, State of Washington;

3. Norm Maleng, King County Prosecutor, State of Washington;

4. Jeffrey C. Sullivan, Yakima County Prosecutor, State of Washington

5. James Sloane, Spokane City Attorney, State of Washington;

6. Fred Andrews, Yakima City Attorney, State of Washington.

The above-enumerated parties occupied the status of Defendants before the United States District Court, Appellees in the United States Court of Appeals for the Ninth Circuit, and are presently Appellants in the action before this court. The below-enumerated parties were Plaintiffs before the United States District Court for the Eastern District of Washington, Appellants in the United States Court of Appeals for the Ninth Circuit, and occupy the status of Appellees before this court.

1. J-R Distributors, Inc.,;

2. Azure Entertainment Corporation of Washington;

3. Jack R. Burns, in his representative capacity as Executor of the Estate of Selom F. Burns;

4. Playtime Theaters, Inc.;

5. Kukio Bay Properties, Inc.;

6. Spokane Arcades, Inc.;

7. American Civil Liberties Union of Washington;

8. Madrona Publishers, Inc.;

9. Superior Publishing Company;

10. Washington Library Association;

11. Pacific Northwest Bookseller's Association;

12. Motion Picture Exhibitors of Washington, Alaska, and Northern Idaho;

13. Washington State Council of Teachers of English;

14. Washington Library and Media Association;

15. The Community College Library and Media Specialists Association of Washington.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i.
LIST OF PARTIES TO THE PROCEEDINGS	iii.
TABLE OF AUTHORITIES	vi.
OPINIONS BELOW	1
JURISDICTION.	1
CONSTITUTIONAL PROVISIONS AND STATUTES.	3
STATEMENT OF THE CASE.	3
SUMMARY OF ARGUMENT	7
ARGUMENT	11
CONCLUSION	30
CERTIFICATE OF SERVICE	31

TABLE OF AUTHORITIES

CHAPLINSKY v. NEW HAMPSHIRE,
351 U.S. 568, 572 (1942). 14

COHEN v. CALIFORNIA,
403 U.S. 15, 20 (1971) 25

GINZBURG v. UNITED STATES
383 U.S. 463, 470-71 (1966) . . 18, 24, 27

J.R. DISTRIBUTORS, INC. v.
EIKENBERRY, 725 F.2d 482, 490
(9th Cir. 1984) 12, 29

JACOBELLIS v. OHIO,
378 U.S. 184, 191 (1964) 13

MICHKIN v. NEW YORK,
383 U.S. 502 (1966) 25

MILLER v. CALIFORNIA,
413 U.S 15 (1973) 5, 8, 10
12, 13, 16, 20, 25, 27, 28, 29

MUTUAL FILM CORP. v. INDUSTRIAL
COM., 236 U.S. 230, 232 (1916) . . . 23

NEW YORK TIMES v. SULLIVAN,
376 U.S. 254, 269 (1964) 15

REGINA v. HICKLIN,
[1868] L.R. 3 Q.B. 360, 371 21

ROTH v. UNITED STATES,
354 U.S. 476 (1957). 5, 8, 14, 15
18, 19, 22, 23

SMITH v. UNITES STATES,
431 U.S. 291, 310 (1977)(Powell,
J. concurring) 28

SPLAWN v. CALIFORNIA
431 U.S. 595, 598 (1977) 9, 14, 26

UNITED STATES v. KENNERLY
209 F. 119, 120 (S.D.N.Y. 1913) . 21, 22

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION
Amendment I 3

UNITED STATES CONSTITUTION
Amendment XIV, §1 3

UNITED STATES STATUTES

28 U.S.C. § 1254(2) 1

STATE OF WASHINGTON STATUTES

WASH. REV. CODE,
§ 7.48.010-7.48A.900 3

WASH. REV. CODE,
§ 9.68.140 3

RCW 7.48.010(8) 4

OTHER AUTHORITIES

WEBSTER'S NEW INTERNATIONAL
DICTIONARY (Unabridged,
3d Ed. 1976) 7

TEXTS

PLAYBOY Magazine 7

DAVIDOW AND O'BOYLE, OBSCENITY LAWS IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS, 56 Nebraska L.Rev. 249, 273 (1977) 22

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 725 F.2d 482 (9th Cir. 1984). The opinion of the United States District Court for the Eastern District of Washington, which the Ninth Circuit decision reversed, is reported at 544 F. Supp. 1034 (E.D. Wash. 1982).

JURISDICTION

1. This is an appeal from the judgment of the Court of Appeals for the Ninth Circuit invalidating as repugnant to the federal constitution a state statute regulating obscenity. The statutory basis of this appeal is 28 U.S.C. § 1254(2).

2. The judgment of the United States

Court of Appeals for the Ninth Circuit was entered on February 6, 1984. A timely petition for re-hearing was filed, and was denied by the United States Court of Appeals for the Ninth Circuit on April 6, 1984. Notice of Appeal was filed by this appellant on June 25, 1984, with the United States Court of Appeals for the Ninth Circuit. This Court noted probable jurisdiction on October 1, 1984.

3. The statutory basis conferring jurisdiction on this court is 28 U.S.C. § 1254(2), which provides in relevant part for review by the Supreme Court of cases in the Court of Appeals "[by] appeal by a party relying on a state statute held by the Court of Appeals to be invalid as repugnant to the Constitution, treaties, or laws of the United States, . . .".

CONSTITUTIONAL PROVISIONS

AND STATUTES

1. U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. Const. amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

3. Wash. Rev. Code § 7.48A.010-7.48A.900 (HB 626);

4. Wash. Rev. Code § 9.68.140 (HB 626);

STATEMENT OF THE CASE

The Washington State Legislature enacted the

statutes in controversy with an effective date of April 1, 1982. On April 5, 1982, J-R Distributors, Inc., and Azure Entertainment Corporation of Washington filed separate suits in the United States District Court for the Eastern District of Washington, seeking declaratory and injunctive relief against the enforcement of the statutes. They were subsequently joined by other parties filing similar suits. The seven suits were consolidated for hearing by the District Court and have remained consolidated for review and judgment in the United States Court of Appeals for the Ninth Circuit.

The appellees, in the United States District Court, claimed that the inclusion of the word "lust" in the statute's definition of "prurient" unconstitutionally expanded the Roth-Miller tripartite test for obscenity. "Prurient" is defined in § 1(8) [RCW 7.48A.010(8)] of the

statute as "that which incites lasciviousness or lust". Appellees, in the consolidated cases maintained, on this issue, that "prurient" may only be defined under Roth-Miller as that which is characterized as a shameful or morbid interest in sex, nudity or excretion. This issue was first raised by appellees, J-R Distributors, Inc., and Azure Entertainment in their Brief in Support of Motion for Temporary Restraining Order.

Appellants argued that the meaning of "prurient" embraced the word "lust" and that this specific judicial meaning was established in Roth, and affirmed by Miller. Roth v. United States, 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15 (1973). We urged that the "prurient" part of Miller's tripartite test required only that the expression, in some significant way, be erotic. The District Court concluded that the Roth decision settled on a definition of "prurient"

as that matter having a tendency to incite lustful thoughts. It felt that juries would be able, based upon their understanding of the common meaning ascribed to lust and lasciviousness, to properly apply the "prurient" prong of Miller.

On appeal, appellees urged again a circumscribed definition of "prurient" which could only entail a shameful or morbid interest in sex, nudity or excretion. It was first argued in J-R Distributors, and Azure Entertainment's Statement of Issues, p. 3. The Ninth Circuit concluded that irrespective of whether Miller equated "prurient" interest with "lust" the connotations which accompanied the word "lust" in 1957 have changed significantly. The Court said the word "lust" now has acceptable connotations and refers in common usage to a healthy and wholesome interest in sex. It ruled further that Roth actually compelled only one constitutionally

acceptable definition of "prurient" -- a shameful or morbid interest in sex, nudity or excretion.

The Court of Appeals held that by including the word "lust" in its definition of "prurient", the Washington State Legislature exceeded established boundaries of obscenity regulation by punishing something other than a shameful or morbid sex interest. The court ruled that the word "lust" cannot be used because it now connotes a healthy, wholesome and human reaction to sex, and cited a Playboy magazine interview with President Carter and Webster's New International Dictionary (Unabridged, 3d Ed. 1976), for further support of connotative change.

SUMMARY OF ARGUMENT

The purpose of this Court's obscenity test is to separate protected from unprotected

expression. Roth v. United States, 354 U.S. 476, 488 (1957). Only expression which meets all three prongs of a conjunctive, three-part test, is hard-core pornography and can be found to be obscene. Miller v. California, 413 U.S. 1, 24 (1973). No single factor of the test is fully determinative of the ultimate question of obscenity; all must coalesce in order for certain expression to be found obscene. Id. at 24-25, 30.

Each prong of the Miller test serves to separate protected from unprotected expression, but all three must be met for the expression to be denied First Amendment protection. Because sex and obscenity are not synonymous, application of the first prong assures that only "material which deals with sex in a manner appealing to prurient interest" will be subject to the remaining two prongs of the obscenity test. Roth, 354 U.S. at 487. To illustrate the purpose

of the pruriency prong, the Roth court provided a list of definitions. Id. at 487, fn. 20. All definitions serve to distinguish sexual desire or longing from descriptions or depictions of sex that embrace the exposition or advocacy of ideas. The latter category of expression exhibits characteristics that the first amendment was designed to protect, and which distinguish it from obscenity. Expression which merely stimulates sexual desire or longing, however, appeals to the prurient interest, and while not obscene at this stage of the analysis, is nevertheless subject to the remaining prongs of the Miller test.

Later decisions of this Court acknowledge that this is the function of the "prurient interest" prong. If the appeal is for "titillation, not saving intellectual content," the function of the prong is served, and the expression is subject to the full test. Splawn v. California, 431 U.S. 595, 598 (1977). The Miller decision confirmed

that the pruriency prong performs a threshold function of separating appeals to the intellect from appeals to sexual stimulation. This checking function assures that expression may be both prurient and patently offensive, but not obscene because it exhibits serious literary, artistic, scientific or social value. Miller, 413 U.S. at 30.

The Ninth Circuit erred when it concluded that expresson which stimulates sexual desire or longing can be punished, as obscene, under Washington's anti-obscenity law, HB 626. Expression which stimulates in this manner merely meets the prurient interest prong of HB 626 and the Roth-Miller test, but is still subject to the additional factors of patent offensiveness, and the value. of the work. This Court has never restricted the meaning of "prurient interest" to that which is shameful of morbid. The reference in footnote 20 of Roth to this phrase was merely to observe that it formed a subgroup of all

appeals to sexual longing or desire which are characterized as "prurient appeals".

HB 626 defines "prurient interest" in language consistent with the purpose of this part of the Miller test, viz. that which incites sexual desire or longing. The use of the word "lust" in this statutory definition is consistent with the requirements of Roth-Miller and the purpose of the concept of "prurient interest."

ARGUMENT

The initial challenge to Washington state's anti-obscenity law (hereinafter HB 626) and that which was sustained by the Ninth Circuit Court of Appeals involved the first prong of the currently accepted tripartite test of obscenity. Under Miller, an average person applying contemporary community standards must find "that the work, taken as a whole, appeals to the

prurient interest." Miller v. California, 413 U.S. 15, 24 (1973). The textual portion of HB 626 tracks this language and §1(8) defines "prurient" as that "which incites lasciviousness or lust." The Ninth Circuit concluded that this language expanded Miller's guidelines impermissibly on two grounds. First, the Ninth Circuit ruled that the only constitutionally acceptable meaning of "prurient" is a "shameful or morbid interest in sex, nudity or excretion." J. R. Distributors, Inc.v. Eikenberry, 725 F.2d 482, 490 (9th Cir. 1984). Second, it concluded that "lust" had lost its historical meaning, and now connotes little more than a "healthy, wholesome, human reaction common to millions of well-adjusted persons in our society." Id. at 490. On this basis, it ruled that Washington's anti-obscenity law defined "prurient" too broadly, thus the statute was overbroad and unconstitutional. In fact, the court's opinion observed that expression that

"may merely stimulate sexual longing or desire . . . cannot constitutionally be branded obscene." Id. at 490.

The conclusion that "prurient" may only embrace a shameful or morbid interest in sex seriously misapprehends the purpose of the "pruriency" concept, and is inconsistent both with the historical development of the concept in American jurisprudence, and with this Court's decisions. Indeed, the "pruriency" concept is but the first factor in a three part conjunctive Miller test that must coalesce before a trier of facts can conclude any expression is obscene. Miller, 413 U.S. at 24-25; see Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). Its function is to separate an appeal to an intellectual interest in sex, and hence a protected one, from an appeal to a non-reasoning, non-cognitive stimulation. If the appeal is for "titillation, not for saving

intellectual content," then the pruriency factor is met, and the remaining prongs of the tripartite test must be addressed before the obscenity determination is complete. Splawn v. California, 431 U.S. 595, 598 (1977). The "pruriency factor is, therefore, value-neutral and serves to distinguish an intellectual interest in sex from a non-cognitive, intuitive physical incitement.

Any examination of the historical development of obscenity law in the United States must commence with a view that obscene expression "are not an essential part of any exposition of ideas." Roth v. United States, 354 U.S. 476, 485; see also Chaplinsky v. New Hampshire, 351 U.S. 568, 572 (1942). Its non-protected status, therefore, derives from the constitutional imperative that first amendment protection was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social

changes desired by the people." New York Times v. Sullivan, 376 U.S. 254, 269 (1964), quoting Roth v. United States, supra, 354 U.S. at 484. Obscene expressions exhibit no first amendment protection because they embody none of the interests that the first amendment was designed to protect.

This Court has long recognized that the essential function of an obscenity test is to distinguish protected from unprotected expressions, affording constitutional protection to the first category, and making the latter subject to legislative control. Roth v. United States, supra, 354 U.S. at 488. Formulation of a test with sufficient guidelines to distinguish obscenity from protected first amendment expression commenced with Roth and culminated in Miller. In fact, Miller represented the first time since the Roth decision that "a majority of this court has agreed on concrete guidelines to isolate 'hardcore'

pornography from expression protected by the First Amendment." Miller v. California, supra, 413 U.S. at 29. Each prong of the Miller test functions to scrutinize the expression to determine if it exhibits characteristics that entitle it to first amendment protection. Satisfying one or most of the three tests is not determinative of the ultimate question of obscenity -- all must coalesce before a correct constitutional assessment be made. Miller v. California, supra, 413 U.S. at 24-25.

Under the Miller test, an expression is obscene if the following three prongs are satisfied:

> (a) "Whether 'the average person, applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest;
>
> (b) Whether the work depicts or describes, in a patently offensive way,

> sexual conduct specifically defined by the applicable state law; and
>
> (c) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

Id. at 24. The "pruriency" prong was designed to create an overinclusive category of expression all of which appeal to prurient interest, and some of which may be obscene if remaining Miller tests are satisfied. The error of appellees and the Ninth Circuit decision lies in the mistaken assumption that the obscenity determination is made merely through application of the "pruriency" prong. Indeed, expression that merely stimulates sexual longing or desire, while meeting the pruriency prong, must meet both of the remaining Miller prongs, to be "hard-core" before it is denied first amendment protection. These prongs assure that only prurient expression may be adjudged obscene, but also provide a check so that not all prurient

expressions are ob. ·ene.

Only in Roth v. United States did this Court attempt to define "prurient interest," although evidence of the character of that concept is found in many pre- and post- Roth decisions. Although the Court employed various descriptive words to illustrate the concept, all share a common purpose that requires the trier of fact to determine whether the expression appeals to exposition or advocacy of ideas, or instead appeals to "titillation" or "sexual stimulation." Ginzburg v. United States, 383 U.S. 463, 470-471 (1966). If the appeal is to the non-cognitive interest, the pruriency interest category is established, and the remaining prongs in Miller are fully determinative of the ultimate question of obscenity.

The Roth opinion took measured steps to

make clear that not every description or discussion of sex could be prohibited. Because "sex and obscenity are not synonymous" only "material which deals with sex in a manner appealing to prurient interest" could be obscene, subject to the checking scrutiny of the remaining tests of Roth, and later Miller. Roth v. United States, supra, 354 U.S. at 487 [footnote omitted]. To distinguish a protected, intellectual interest in sex from one appealing to a non-cognitive or stimulative interest, the Roth court provided a long list of illustrative definitions. Id. at 484, fn.20. Each of the definitions of the footnote shared a common core purpose -- "prurient interest" means sexual stimulation, either manifested physically or intuitively, and does not pertain to an intellectual interest in sex. First Amendment protections are not accorded, thusly, to expression appealing to "titillation" that also meet the remaining of the

Roth-Miller guidelines.

Indeed, the Miller court recognized that the "pruriency" concept embodied no value judgment and merely served to move the character of the expression to the full constitutional test of obscenity. It recognized that the purpose of the pruriency prong was to separate speech from nonspeech by making essentially a judgment-neutral decision that an appeal was not to ideas, but to physical desire, longing or stimulation. That this was the function of the pruriency prong is evident in the Miller conclusion that an expression may be both prurient and patently offensive, but not obscene:

> At a minimum, a prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.

Miller v. California, 413 U.S. at 26. The Ninth Circuit erred when it assumed that the ultimate

determination of obscenity is fully answered merely through the application of the threshold test of "prurient interest". This assumption is at odds with this Court's requirement that all three prongs must coalesce in order for expression to be adjudged obscene. Id. at 24-25.

That "prurient interest" is equated with the sexual stimulation or longing is confirmed by observing what Roth-Miller rejected in earlier tests of obscenity. English and early American jurists held that obscenity should be constitutionally defined in terms of its tendency to "deprave or corrupt." Regina v. Hicklin, [1868], L.R. 3 Q.B. 360, 371; United States v. Kennerly, 209 F. 119, 120 (S. D. N.Y. 1913). Roth replaced the ambiguous notion of "deprave or corrupt" with the concept of "prurient interest" because an application of the former to certain expressions could offend first amendment

values. Simply, because "deprave and corrupt" tendencies carried potential application to the market place of ideas, a concept was established to distinguish the intellectual interest from the sexual longing, prurient interest in sex. This Court sought to remove any potential for the trier of fact to judge the social utility of a particular intellectual interest in sex by distinguishing "prurient interest" as a physical stimulation exclusively. Thus, American jurisprudence discarded by its reasoning in the Roth decision what was previously permitted in Hicklin in English obscenity jurisprudence -- the authority of the trier of fact to judge the social utility of the idea embraced by the allegedly obscene expression. Roth v. United States, supra, 354 U.S. at 489; see also United States v. Kennerly, supra, 209 F. at 120-121; Davidow and O'Boyle, Obscenity Laws in England and the United States: A Comparative Analysis, 56 Nebraska L.Rev.

249, 273 (1977).

While this Court has not exhaustively analyzed the "pruriency" concept, the cases discussing it are internally consistent. All show less concern with dictionary definitions of "prurient" than with the function served by the concept. Its purpose is to initially, but not conclusively, evaluate the expression in terms of first amendment interests. The required appeal must heighten, exacerbate, or otherwise stimulate sexual longing or desire, without regard to whether the stimulated desire is wholesome or not, to permit the proper application of the remaining prongs of the Miller test. See, e.g. Mutual Film Corp. v. Industrial Com., 236 U.S. 230, 232 (1916), cited with approval in Roth v. United States, supra, 354 U.S. at 484, fn. 20. The post- Roth decisions of this Court reflect this concern and did not require the

appeal to be shameful or morbid.

The Roth court considered as synonyms for "prurient interest" phrases such as "lustful thoughts" or "lascivious longings," taking care to make certain each phrase was predicated with a verb indicating stimulation. Id.[1] If the "erotically arousing" material provides "sexual stimulation" to the "salaciously disposed" the purpose of the factor of "prurient" is satisfied. Ginzburg v.United States, supra, 383 U.S. at

[1] The Ninth Circuit's and the appellees' heavy reliances on the Roth court's reference in footnote 20, to the Model Penal Code's definition of "prurient interest" is historically and logically misplaced. The Commentaries' example rested on its perceived societal interest in deterring "the deliberate stimulation and commercial exploitation of emotional tensions" and simply restricted obscenity to the "erotic." If the sole purpose of the material is to arouse or stimulate that which is erotic, this 1957 Model Penal Code perception of the function of "prurient" was satisfied. Model Penal Code § 207.10, et seq. (Tent. Draft No. 6, 1957).

470-471. No further requirement compelled a trier of fact to evaluate whether the stimulation was wholesome or not.

In Michkin v. New York, 383 U.S. 502 (1966), this Court rejected as "unrealistic" an interpretation of the "prurient interest" factor that would require any further showing except "stimulating the erotic." Id. at 508. This view was affirmed in a later case, which recognized that obscenity could be prohibited if, the expression was, "in some significant way, erotic." Cohen v. California, 403 U.S. 15, 20 (1971). The Miller decision did nothing to alter this requirement of stimulative appeal or impact. Indeed, it reaffirmed the view that obscene material has a specific judicial meaning "which derives from the Roth case, i.e. obscene material 'which deals with sex.'" Miller v. California, supra, 413 U.S. at 18, fn. 2. While Miller did

nothing to refine the concept, it did eschew any suggestion that a national standard of what appealed to "prurient interest" was constitutionally mandated. Id. at 30. Instead, this Court implicitly recognized that "prurient interest" involved perceptions of either intuition or physical stimulation or both, and deferred to the jury system in making this assessment rather than fastening the national standard of "abstract formulation." Id. The Miller court deferred to Roth's earlier formulation of "prurient interest" as sufficient.[2]

In Splawn v. California, this Court cited

[2] It is urged that this Court has long accepted the view that the "prurient" prong embraces both the application of words that reflect a stimulative interest in sex, or an intuitive feeling that the appeal is to sexual arousal. Roth v. United States, 354 U.S. at 486, fn. 20; Jacobellis v. Ohio, supra, 378 U.S. at 197 (Stewart, J., concurring) ["I know it when I see it."]

numerous earlier cases that distinguished "prurient interest" as an appeal to sexual desire or arousal, and not to the exposition of ideas. If the expression is deliberately represented as "erotically arousing," then the reader was forced to accept them as prurient; accordingly, the prurient test was satisfied because the reader looked for "titillation, not saving intellectual content." 431 U.S. at 595, 598, citing Ginzburg v. United States, supra, 388 U.S. at 470. The Splawn court's reasoning provided historical consistency to the concept of "prurient interest" and set it apart as a value-neutral factor. The application of the remaining Miller prongs, therefore, are determinative of the full test of obscenity. Miller v. California, supra, 413 U.S. at 30.

It is clear that Roth's treatment of "pruriency" has both retained its constitutional

significance, and actually embraced a far more flexible directive on the purpose of the "pruriency" prong and the manner in which the states may define it. Miller v. California, supra, 413 U.S. at 30. This Court has never held that "pruriency" embraces solely an appeal to the shameful or morbid interest in sex. "Within the boundaries staked out by Miller, the states retain broad latitude" to establish their anti-obscenity laws. Smith v. United States, 431 U.S. 291, 310 (1977)(Powell, J., concurring.) So long as a state utilizes a definition of "pruriency" that embraces words indicating an appeal to sexual desire or arousal, stimulation, or inciting an interest in sex, the constitutional imperative of this Miller prong is satisfied.

The definition of "prurient" found in Washington's anti-obscenity law, HB 626, meets the purpose of this prong by providing a textual

definition towards physical stimulation, arousal, or a non-cognitive interest in sex. §1(8) defines "prurient" as that which "incites lasciviousness or lust." [Emphasis supplied.] Clearly, this language fulfills the historical and logical purpose of the "pruriency" prong by distinguishing sexual arousal or desire from a protected intellectual interest in sex. Rather than being fully determinative of the ultimate question of obscenity, which was the erroneous assumption of the Ninth Circuit's opinion, application of this language moved the expression to the next test of Miller. Miller v. California, supra, 413 U.S. at 30; cf. J. R. Distributors Inc. v. Eikenberry, 725 F. 2d at 491. The language of §1(8) does not punish mere sexual desire; it separates a class of expression determined as prurient to permit full application of the Miller obscenity test. On this basis, it both meets the purpose of the "prurient" prong

and facilitates full application of the constitutional obscenity test of Miller v. California.

CONCLUSION

The Ninth Circuit Court of Appeals erred when it overturned the Dictrict Court and held the Washington statute to be unconstitutional. Thus, the Ninth Circuit should be reversed and the statute upheld.

Respectfully submitted,

DONALD C. BROCKETT
Prosecuting Attorney

DAVID A. SARACENO
Deputy Prosecuting Attorney

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 1984, three copies of the foregoing Brief of Appellant Brockett were sent by U.S. Mail, Postage Prepaid, to all counsel required to be served:

CHRISTING O. GREGOIRE, ESQ.
Deputy Attorney General
Office of the Attorney General
Temple of Justice
Olympia, WA 98504

Attorney for Appellants

Kenneth Eikenberry, James Sloan, Jeffrey C. Sullivan, Fred Andrews, and Norm Maleng

JOHN H. WESTON, ESQ.
Brown, Weston & Sarno
433 N. Camden Drive
Suite 900
Beverly Hills, CA 90210

Attorney for Appellees

By _____
DAVID A. SARACENO
Counsel for Appellant Brockett

SUBSCRIBED and SWORN to before me this

15th day of November, 1984.

_____
NOTARY PUBLIC in and for the
State of Washington, residing at
Spokane